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No. 80-2016

# In the Supreme Court of the United States

**October Term, 1980**

JAMES P. FRACKELTON,
*Petitioner,*

vs.

GUS SWANSON, VIRGINIA SWANSON,
SHIA SHAPIRO,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI
**To the Supreme Court of Ohio**

DONALD M. ROBINER, *Counsel of Record*
PAUL F. LEVIN
SCHWARZWALD, ROBINER, WOLF & ROCK,
A Legal Professional Association
1700 Ohio Savings Plaza
1801 East Ninth Street
Cleveland, Ohio 44114
(216) 781-1700
*Counsel for Petitioner*

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

## QUESTION PRESENTED FOR REVIEW

Whether the requirement under Ohio law, that an individual asserting a claim for malicious prosecution must allege and prove as an element of damage either arrest of his person or seizure of his property, constitutes a denial to that individual of due process of law and equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution?

## PARTIES TO THE PROCEEDING

The parties to the proceeding in the Supreme Court of Ohio are all of those parties listed in the caption of the case in this Court.

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## PETITION FOR A WRIT OF CERTIORARI

**To the Supreme Court of Ohio**

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James P. Frackelton petitions for a writ of certiorari to review the judgments of the Supreme Court of Ohio, entered February 26, 1981, overruling petitioner's motion for an order directing the Court of Appeals for Cuyahoga County, Ohio to certify its record, and dismissing petitioner's appeal.

## OPINIONS BELOW

The Supreme Court of Ohio did not deliver an opinion, but acted by means of journal entries denying petitioner's motion to certify (Appendix A1) and dismissing the appeal (Appendix A2). The Court of Appeals for Cuyahoga County, Ohio delivered an opinion which is unreported

(Appendix A3). The Court of Common Pleas of Cuyahoga County, Ohio did not deliver an opinion. It granted respondents' motions to dismiss by means of journal entries (Appendix A9 and A10).

## JURISDICTION

The judgments of the Supreme Court of Ohio overruling petitioner's motion to certify and dismissing his appeal were entered on February 26, 1981. The Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

## CONSTITUTIONAL PROVISION

**Fourteenth Amendment, United States Constitution:**

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of ctitizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdicton the equal protection of the laws.

## STATEMENT OF THE CASE

Petitioner, James P. Frackelton, is a physician engaged in the practice of family medicine in the suburbs of Cleveland, Ohio. In September, 1972, respondent, Gus Swanson, requested petitioner to perform a bilateral vasectomy for the purpose of sterilizing Mr. Swanson. The operation was performed by petitioner, and thereafter, re-

spondent Gus Swanson was advised as to the necessity of certain post operative laboratory tests to confirm his sterility. After several such tests, on March 17, 1973, Mr. Swanson was pronounced sterile. Thereafter, respondent Virginia Swanson, Gus Swanson's wife, became pregnant and gave birth to a baby girl on February 28, 1974. Considering the normal range in the length of the human gestation period, respondent Virginia Swanson conceived, at the earliest, sometime in May 1973, two months after respondent Gus Swanson was conclusively pronounced sterile.

Despite actual knowledge of the results of Gus Swanson's laboratory tests, and despite an obvious alternative explanation of Virginia Swanson's pregnancy, on May 24, 1974, Gus and Virginia Swanson, through their attorney, respondent Shia Shapiro, filed an action in negligence and breach of warranty against petitioner in the Common Pleas Court of Cuyahoga County, Ohio, alleging that petitioner had improperly performed the vasectomy operation. During the course of the Swanson's negligence litigation, pursuant to a defense request Mr. Swanson was again tested and again confirmed to be sterile. Nevertheless, respondents persisted with their litigation. During the course of the trial, a directed verdict was granted in favor of petitioner.

The Swansons' negligence litigation had a serious affect upon petitioner, and caused him significant damage. Pressure as a result of the litigation prevented petitioner from devoting full attention to his professional activities and he was forced to resign as Chairman of the Department of Family Practice at Fairview General Hospital, Cuyahoga County, Ohio. Solely on account of the filing of the lawsuit, unfounded though it was, petitioner's medical malpractice insurance premiums were increased to such a degree that he was forced to change from a claims made

policy to a less protective occurrence policy. Petitioner's practice declined and the indignity, embarrassment, humiliation and nervousness eventually resulted in petitioner requiring extensive hospitalization and treatment for severe mental trauma.

Seeking redress for the unfounded claims made against him by respondents, petitioner thereafter filed a malicious prosecution and abuse of process action against respondents, Gus and Virginia Swanson, and their attorney, Shia Shapiro, alleging in detail all of the facts set out above and claiming that respondents' actions caused him damage resulting from abuse of civil process and malicious prosecution. Respondents moved to dismiss in the trial court, claiming that petitioner's failure to allege and establish either seizure of property or arrest of the person, a predicate for maintenance of a malicious prosecution or abuse of process action in Ohio, prevented him from stating a claim upon which relief would be granted. Respondent Shia Shapiro further claimed that as attorney for the Swansons, he was immune from any liability for actions taken on their behalf. The trial court granted the motions to dismiss without opinion.

Thereafter, an appeal was taken to the Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County, Ohio. The Court of Appeals affirmed the judgment of the Court of Common Pleas, holding that failure to allege either arrest or seizure of property constituted failure to state a cause of action for which relief could be granted. The Court of Appeals did not treat an assignment of error relating to maintenance of a malicious prosecution action against an attorney, in light of its holding that petitioner had failed to state a claim upon which relief could be granted.

Thereafter, petitioner moved the Supreme Court of Ohio for an order directing the Court of Appeals of Cuyahoga County to certify its record, and concurrently took an appeal as of right to the Supreme Court of Ohio. The Supreme Court of Ohio overruled the motion to certify, and *sua sponte*, dismissed the appeal "for the reason that no substantial constitutional question exists" (Appendix A2).

Petitioner has been injured by respondents' actions in filing the original negligence action against him, and their further prosecution thereof, but has been left without redress for those injuries. There exists a wrong against petitioner, for which no remedy has been provided. Consequently, petitioner has been denied due process of law and equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution.

## FEDERAL QUESTIONS

The federal question, *i.e.* deprivation of due process and equal protection, inherent in the absence of a remedy, was raised by petitioner in his brief in opposition to respondents' motions to dismiss in the trial court, in his assignments of error and brief in the Ohio Court of Appeals, and his memorandum in support of jurisdiction in the Ohio Supreme Court. In each case, the court ignored this issue and ruled strictly on the requirement of arrest and/or seizure under Ohio law.

## REASONS FOR ALLOWANCE OF THE WRIT

The facts as set out in the preceding section relate a classic violation of the common law maxim; "for every wrong there is a remedy". Clearly, Dr. Frackelton, petitioner herein, has been wronged gravely, but, because of the state courts' slavish application of an archaic and unreasonable restriction on the maintenance of a malicious prosecution action, petitioner has been denied a remedy. Consequently, he has been denied due process and equal protection guaranteed by the Fourteenth Amendment.

As a general proposition, the right to pursue one's occupation, including the practice of medicine, is one of the fundamental rights of citizens, under the United States Constitution and under state law, and one is entitled to have that right protected and secured, free from unreasonable interference. Such was the holding in Ohio, *Seligman v. Toledo Moving Picture Operators Union,* 88 Ohio App. 137, 98 N.E.2d 54 (1947) (right to pursue occupation of movie projector operator); and in numerous other states, *People v. Love,* 28 Ill. 304, 131 N.E. 809; *Rush v. St. Petersburg* (Florida App. D. 2) 205 So.2d 11; *In re Lifshutz,* 2 Cal. 3d 415, 467 P.2d 557 (right to practice medicine).

Improper interference with a recognized property right, in the form of a malicious prosecution of an individual such that his property right is thereby damaged, ought to find redress in a civil action for damages. Ohio's denial of the right of redress is thus, *a fortiori,* a denial of due process and equal protection, since the individual is without a remedy for his wrong. Ohio is among the minority of jurisdictions which require as a prerequisite for the maintenance of a malicious prosecution action the actual seizure of property or the physical arrest of the person.

The Court of Appeals in Ohio recognized as much at page 4 of its journal entry and opinion (Appendix A6). By contrast, a majority of jurisdictions have abolished the strict English rule requiring such seizure or arrest. Perpetuation of the restriction in Ohio contrasted with relief from that restriction in other jurisdictions, works an imimpermissible hardship on malicious prosecution plaintiffs in Ohio, which is not imposed on plaintiffs similarly situated elsewhere.

The principle that for every wrong there must be a remedy has been eloquently stated by the District Court for the District of Rhode Island in *James v. United States*, 358 F. Supp. 1381 (1973), wherein the Court considered whether there ought to be some constitutionally protected right of redress for a civil wrong. The Court stated:

> The protection of liberty, life and property offered by the Fourth and Fifth Amendments is basic to our constitutional jurisprudence. These protections are found in the constitutional tradition of English law, which formed the background for our own Constitution, and can be traced back to the Magna Charta. Clause 39 of the Magna Charta provided that
>
> > 'No man shall be in any sort destroyed unless it be by the verdict of his equals, or according to the law of the land.
> >
> > Coke's Second Institute. Commentary on the Magna Charta, published in 1642 by order of the House of Commons, in Pound, The Development of Constitutional Guarantees of Liberty 148 (1957).
>
> It would be peculiar indeed if Courts were able to imply remedies for statutory rights in securities laws, see J.I. Case v. Borak, 377 U.S. 426, 84 S. Ct. 1555,

12 L. Ed. 2d 423 (1964), but unable to provide an ordinary judicial remedy for invasion of rights protected by the supreme law, the Constitution, and basic in our scheme of liberties. See Katz, The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in Bell v. Hood, 117 U.Pa. L.Rev. 1 (1968).

> While money damages are indisputably among the traditionally available judicial remedies, it is true that the common law did not recognize actions for wrongful death. If, as *Bivens* holds, the source of the right sued upon is the Constitution, I would find it of little consequence whether in non-constitutional areas the cause of action is created by the legislature or existed at common law. *The Constitution itself is silent about causes of action, yet must have implicitly meant for there to be remedies for violations of protected rights.* See Hill, Constitutional Remedies, 69 Col. L.Rev. 1109, 115 n. 193 (1969). Thus, I would find the fact that this is a wrongful death action to be no impediment to a cause of action for damages based on the Fourth and Fifth Amendments. What other sort of action could there be for violation of the constitutional prohibition against the taking of life without due process? A remedy in damages would be appropriate. (Emphasis supplied.)

The Ohio Constitution as well provides for the right of redress in courts. Article I, Section 16 states:

> All courts shall be open, and every person, for an injury done him, in his land, goods, person, or reputation, shall have remedy by due process of law, and shall have justice administered without denial or delay.

A similar constitutional provision was considered by the United States District Court for the Southern District of Alabama in *Mobile Mechanical Contractors Assn. v. Carlough*, 456 F. Supp. 310 (1978). The Court considered a section of the Alabama Constitution which stated, similarly to the Ohio provision, that:

> . . . every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law; . . .

The court stated:

> Alabama law has long recognized that the 'right to conduct one's business without the wrongful and injurious interference of others, is a valuable property right'.

The court allowed redress for a claim, where it was not otherwise redressable, reasoning as follows:

> Courts of Alabama recognize and are bound by the laws of the United States, because, as the Alabama Supreme Court stated in *Forsyth v. Central Foundry Co.*, 240 Ala. 277, 198 So. 706, 710(1940), [t]he laws of the United States are as much a part of the law of Alabama as its own local laws.

In short then, it cannot be questioned that the courts of the State of Ohio must give due deference to the requirements of the United States Constitution. In denying petitioner's right to sue for malicious prosecution in the State of Ohio, the Ohio Courts have ignored this responsibility.

In view of the federal constitutional implications of the right to pursue a remedy for the wrong present in the instant case, Ohio's refusal to recognize that right, when such right is required by the Federal Constitution, and

when such right is allowed and recognized in other jurisdictions, constitutes the clearest type of violation of equal protection which one can imagine.

It is perhaps almost a matter for judicial notice to acknowledge that in the past decade, there has been a virtual explosion in the field of medical malpractice lawsuits, which has been of national proportion, and which has national implications. Physicians, like other members of society, are increasingly mobile. Thus, the mere happenstance of a physician's domicile in a "minority" state such as Ohio, at the time of a malicious prosecution against him, rather than in one of the more enlightened majority view states, ought not affect the question of whether or not he has a constitutional right of redress for the wrong inflicted upon him through a maliciously prosecuted malpractice action. To afford the right to some, while denying it to others, merely on the basis of geography, is an unlawful discrimination which is condemned by the United States Constitution. The right of a physician, or any litigant to seek redress for malicious prosecution should be uniformly applied throughout the United States.

Equal protection of the laws is only met when courts are open to all litigants on the same conditions as to others in like circumstances, with like rules of evidence and modes of procedure, for the redress of wrongs. *Truax v. Corrigan*, 257 U.S. 312, 42 S. Ct. 124, *Southern Railroad Company v. Greene*, 216 U.S. 400, 30 S. Ct. 287.

In short, in the words of the Sixth Circuit Court of Appeals, equal protection of the law implies that all litigants similarly situated may appeal to the courts for both relief and defense under like conditions, with like protection, and without discrimination. *Sexton v. Barry* (6th Cir.) 233 F.2d 220. This Court itself, at an early date, recognized

the rule that the grant to one individual of certain rights denied to another similarly situated could be successfully challenged on the ground of unjust discrimination and denial of equal protection of the laws. *Backus v. Fort Street Union Depot Company,* 169 U.S. 557, 18 S. Ct. 445. The right to redress any wrong in the courts should be unaffected by the place of residence. Indeed, by statute, "all persons in the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings. . ." (42 U.S.C. §1981.) Because malicious prosecution victims in Ohio are not afforded the same protection as those similarly situated in other jurisdictions, because they are denied redress for wrongs to their constitutionally protected property rights, they are deprived of the equal protection of the laws.

Even if local variations in the right to bring an action for malicious prosecution are deemed not to violate the guarantee of equal protection, Ohio's application of the strict "English" rule requiring arrest or seizure is unreasonable, and as such, violates due process. Ohio's rule is known as the "English" rule because of its roots in 13th Century English law. Actions for malicious prosecution had their origin in England, and it is important to understand the historical context of the English rule. Prior to the passage of the Statute of Marlbridge, in 1269, actions to recover damages for malicious prosecutions, even where neither the person nor the property of the plaintiff had been interfered with, *were* entertained in English courts. With passage of the Act, such suits were foreclosed if they arose out of a civil action and if there had not been an arrest or seizure of property. However, to assure that pre-existing common law damages were not displaced, the Act provided a summary remedy in their stead—*payment of*

*all costs* to a defendant who prevailed, including attorneys fees, witness fees, and all court costs. In cases of a prior arrest or seizure of property, even such "costs" were still thought to be an inadequate measurer of compensation, and in those instances an action in malicious prosecution remained. Ohio courts uncritically accepted the English rule, despite the fact that the rationale for its existence in England is totally absent in American Jurisprudence. The explanation for the rule in Ohio is contained in *Perry v. Arsham*, 101 Ohio App. 285, 136 N.E.2d 141 (1956). In that case, the Court of Appeals of Cuyahoga County, Ohio, stated:

> This Ohio rule is spoken of as the strict view and arguments in its favor are generally stated as follows:
>
> (1) costs are given as adequate redress; (2) courts should be free and open to all without fear of being sued in return; (3) freely permitting malicious prosecution actions would make ligitation interminable; (4) defendant should have no right to a malicious prosecution action since plaintiff has no action if a defense is malicious and groundless.

An analysis of this rationale discloses that it simply does not apply to American Jurisprudence.

While Rule 54D of the Ohio Rules of Civil Procedure permits a court, in its discretion, to assess costs to the prevailing party, these costs are generally limited to statutory court costs and witness fees. Unlike the English system of costs, which replaced the liberal malicious prosecution standards, Ohio Courts do not reimburse injured defendants for attorney fees which represent the greatest expense of the defense. Assessment of costs in the context of American Jurisprudence most assuredly is not an adequate remedy. Ohio's adherence to the English is out of

context and misplaced. The underpinning of the rule is absent in Ohio, and it must fall of its own weight.

Nor would the more liberal rule necessarily result in interminable litigation. While courts are properly concerned with the expanding size of their civil dockets, it does not logically follow that acceptance of the liberal rule would open the floodgates. The still strict requirement of proving malice and lack of probable cause is sufficient detriment to the institution of a "frivolous" malicious prosecution action. Furthermore, the requirement of allegation and proof of actual arrest and seizure deprives the malicious prosecution plaintiff, having successfully defended a frivolous and malicious lawsuit, the same right which the strict view purports to protect, the right to go into a free and open court system, unfettered by artificial barriers to prosecute a cause when wronged. The Ohio Court of Appeals, in affirming the judgment of the trial court relied on these and other "important policy considerations" in support of the continued application of the English rule, without any genuine analysis of the validity of the policies asserted therefor. The United States Court of Appeals of the Sixth Circuit rejected the notion that crowded court calendars should be a justification for limiting access to a litigant for redress of a wrong. In *Ingram v. Richardson*, 471 F.2d 1268 (1972), the Court stated:

> But the problem of a crowded docket must not be allowed to close the door to a litigant who has a statutory right of review by a court.

This is all the more so when the right to redress is constitutionally protected.

Likewise, the invocation of the "public policy" justification, must not be lightly made. In *Waldron v. British*

*Petroleum*, 231 F. Supp. 72 (S.D.N.Y. 1964) the court stated:

> Violation of public policy may not be loosely invoked as a reason for depriving a litigant of his day in court.

While *British Petroleum* involved the question whether the litigant's violation of public policy should be enough to deprive him of standing to sue, the court's conclusion that it was not seems all the more forceful when viewed against a rather vague and non-specific claim of public policy considerations asserted by Ohio courts in denying all malicious prosecution litigants access under the circumstances of this case.

Viewed against the backdrop of constitutional due process requirements, the Ohio rule cannot stand. Restrictions on constitutionally guaranteed access to courts, if they may stand at all, must be reasonable, and calculated to advance some genuine public policy. The Ohio Rule does not. When weighed against the deprivation of the right to redress for wrong guaranteed by the constitution, it must fail. To justify discriminatory action denying a fundamental right such as a right to access to the courts, the state must show that the discriminatory classification "promotes a compelling state interest". *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969). The state has shown no such compelling interest.

Likewise, denial of any right of cause of action against an attorney who acts irresponsibly in filing a malicious prosecution action is similarly a discrimination which is condemned by the United States Constitution. When a denial of due process is involved, it is necessary to focus not on the status of the party/defendant, but on the substantive conduct involved. If a cause of action for malic-

ious prosecution exists, it must apply with equal force to an attorney defendant. This Court has, through numerous decisions elucidated the meaning of equal protection. See *e.g., Griffin v. Illinois* (1956), 351 U.S. 12; *Skinner v. Oklahoma ex rel. Williamson* (1942), 316 U.S. 353; *Takahashi v. Fish and Game Commission* (1948), 334 U.S. 410; *Yick Wo v. Hopkins* (1896), 118 U.S. 356; *Reed v. Reed* (1971), 404 U.S. 71; *Baker v. Carr* (1962), 369 U.S. 186; *Brown v. Board of Education* (1954), 347 U.S. 483; and *Douglas v. California* (1963), 372 U.S. 353. In each instance, where the court found denial of equal protection, the state was found to have discriminated against the basic rights of persons who were, in fact, substantively in no different position than the remainder of society and yet they were treated differently. In point of fact, it makes little difference to a malicious prosecution victim whether the irresponsible and malicious action was put in motion by the clients, or by their attorney. In either case, the damage is the same and the victim ought to have a right of redress.

## CONCLUSION

This court now has before it an opportunity to address the familiar issue of equal protection and due process in the context of recognizing the constitutional right to redress of a victim of malicious prosecution. The principles established by the Fourteenth Amendment ought to touch all members of society. In Ohio, they do not. Rights as fundamental as those involved here, should have no limitations.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

DONALD M. ROBINER, *Counsel of Record*
PAUL F. LEVIN
SCHWARZWALD, ROBINER, WOLF & ROCK,
A Legal Professional Association
1700 Ohio Savings Plaza
1801 East Ninth Street
Cleveland, Ohio 44114
(216) 781-1700
*Counsel for Petitioner*

# APPENDIX

## ORDER OF THE SUPREME COURT OF OHIO OVERRULING MOTION TO CERTIFY

(Dated February 26, 1981)

No. 80-1827

THE SUPREME COURT OF OHIO

THE STATE OF OHIO, CITY OF COLUMBUS

JAMES P. FRACKELTON,
*Appellant,*

vs.

GUS SWANSON, *et al.*,
*Appellees.*

MOTION FOR AN ORDER DIRECTING ITS COURT OF APPEALS FOR CUYAHOGA COUNTY TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

## ORDER OF THE SUPREME COURT OF OHIO DISMISSING THE APPEAL

(Dated February 26, 1981)

No. 80-1827

THE SUPREME COURT OF OHIO

THE STATE OF OHIO, CITY OF COLUMBUS

JAMES P. FRACKELTON,
*Appellant,*

VS.

GUS SWANSON, *et al.*,
*Appellees.*

APPEAL FROM THE COURT OF APPEALS
FOR CUYAHOGA COUNTY

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

# JOURNAL ENTRY AND OPINION OF THE COURT OF APPEALS

(Dated October 16, 1980)

No. 41921

COURT OF APPEALS OF OHIO
EIGHTH DISTRICT
COUNTY OF CUYAHOGA

JAMES P. FRACKELTON,
*Plaintiff-Appellant,*

vs.

GUS SWANSON, *et al.*,
*Defendant-Appellees.*

## JOURNAL ENTRY AND OPINION

PRYATEL, *J.*

This cause came on to be heard upon the pleadings and the transcript of the evidence and the record in the Common Pleas Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Common Pleas Court is affirmed. Each assignment of error was reviewed and upon review the following disposition made:

Appellant James Frackelton was the defendant in an action based upon breach of warranty and negligence instituted by appellees Gus and Virginia Swanson and filed by their attorney, Shia Shapiro. Appellant had performed a vasectomy upon Gus Swanson; however, Virginia Swan-

son subsequently became pregnant and delivered a child. Appellant eventually prevailed in that lawsuit, obtaining a directed verdict against the Swansons.

He then filed a complaint, which is the subject of the instant appeal, against the Swansons and their attorney. Appellant alleged that appellees maliciously and without probable cause initiated their lawsuit against him while knowing that "laboratory tests conclusively showed that it was medically impossible for Gus Swanson to impregnate Virginia Swanson or any woman." Appellant further alleged that appellees' conduct in preparing, filing and continuing their suit against him was "reckless, willful, wanton and malicious," since they failed to prepare and investigate their claim adequately. Significantly, appellant complained of appellees' failure at any time to engage a qualified medical expert to support their action against him.

Appellees filed separate motions to dismiss, contending that appellant failed to state claims upon which relief could be granted.

Appellant filed a motion in opposition.

The trial court considered the parties' motions, supported by briefs upon the law, and found in favor of appellees, granting their respective motions to dismiss appellant's complaint.

Appellant presents four assignments of error. We shall discuss the first two assignments of error together, since they entail a common issue:

A. FOR PURPOSES OF A RULE 12(B)(6) MOTION, ALL WELL PLEADED ALLEGATIONS IN THE COMPLAINT MUST BE TAKEN AS TRUE.

B. A MALICIOUS PROSECUTION AND ABUSE OF CIVIL PROCESS ACTION IS MAINTAINABLE UNDER THE FACTS AS ALLEGED

1. THE COMPLAINT ADEQUATELY STATES A CAUSE OF ACTION IN MALICIOUS PROSECUTION FOR WHICH RELIEF MAY BE GRANTED.

2. THE FACTS ALLEGED IN THE COMPLAINT MEET EVEN THE STRICT RULE REQUIREMENTS OF ARREST OR SEIZURE OF PROPERTY.

A review of appellant's complaint below indicates that he alleged he was:

> "caused to suffer great indignity, embarrassment, humilitation, nervousness and inability to properly concentrate in his professional activities. Furthermore, plaintiff has been injured in his property through increased costs of insurance coverage for medical malpractice and loss of business."

Nowhere does appellant's complaint show that he was arrested or had his property seized as a consequence of the appellees' initiation of their suit against him. Ohio has consistently held that a suit claiming malicious prosecution of a prior civil action will not lie absent a showing that there has been either an arrest of the person or a seizure of property. *Cincinnati Daily Tribune v. Bruck* (1900), 61 Ohio St. 489; *Avco Delta Corp. v. Walker* (Franklin Cty. 1969), 22 Ohio App. 2d 61; *Delk v. Colonial Finance Co.* (Hamilton Cty. 1963), 118 Ohio App. 451; *Perry v. Arsham* (Cuyahoga Cty. 1956), 101 Ohio App. 285; *Muntz v. Muntz* (Cuyahoga Cty. Sept. 20, 1979), Unreported No. 39208.

While the Ohio rule represents a minority view, important policy considerations support its continued application. First, litigants should have ready access to courts without risking liability for unsuccessful suits. Second, were suits for malicious prosecution more easily used, disputes in litigation would tend to be perpetuated, rather than be concluded. While other elements* must be proved in an action for malicious prosecution, the availability of a remedy for purported malicious prosecution without the arrest of a person or seizure of his property would loom as an uncertain threat against plaintiffs, discouraging their pursuit of bona fide claims.

Since appellant failed to allege either his arrest or seizure of property, his complaint failed to state a cause of action for which relief could be granted. The trial court properly dismissed such complaint for malicious prosecution.

Accordingly, we overrule appellant's first two assignments of error.

C. THE COMPLAINT ADEQUATELY MAKES OUT A CAUSE OF ACTION FOR ABUSE OF PROCESS.

An action alleging malicious prosecution focuses upon the fact that civil process was employed for its ostensible purpose, but was instituted without reasonable or probable cause. On the other hand, an action is deemed an abuse

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*1. The original action was instituted and/or pursued at the instance of the defendants.

2. The original action was terminated in plaintiff's favor.

3. The defendants lacked probable cause to institute and/or pursue the original action.

4. The defendants acted with malice in instituting and/or pursuing the original action.

5. The plaintiff sustained damage as a proximate result of the institution and/or pursuit of the original action.

of process where process, once obtained for whatever reason, is willfully perverted to accomplish an end not lawfully available by such process. *Cf., Avco Delta Corp. v. Walker, supra*; *Bunde v. Kantorik* (Cuyahoga Cty. May 17, 1979), Unreported No. 38837. In short, an action for abuse of process is concerned with the improper use of process after it has been issued.

Paragraph 8 of appellant's complaint below states:

> 8. Defendants' conduct in preparing and filing the aforementioned complaint and continuing to pursue said action against plaintiff James P. Frackelton without adequate preparation and investigation was reckless, willful, wanton and malicious, and constituted a clear abuse of civil process and malicious prosecution.

In his brief in opposition to appellees' motions to dismiss, appellant contended that the liberal pleading allowed by the Ohio Rules of Civil Procedure warranted the inference that the above language alleged an abuse of process by appellees:

> It is sufficient to allege that the institution and continuation of a frivolous action was willful, wanton and malicious to make out a prima facie allegation of abuse of process. It may be inferred from defendants' baseless actions that there was some ulterior and improper motive to them *since it must be assumed from the allegations there was no grounds* [*sic*] *for a negligence or breach of warranty action.* (emphasis added) (Brief, p. 12).

Examination of appellant's argument shows that he is merely reiterating allegations which support a cause of action in malicious prosecution. The complaint is devoid of facts or allegations of any action taken by appellees not authorized by process.

Accordingly, we overrule appellant's third assignment of error.

D. A MALICIOUS PROSECUTION ACTION CAN BE MAINTAINED AGAINST AN ATTORNEY AT LAW, BASED UPON HIS CAPACITY AS SUCH IN A PREVIOUS ACTION.

In light of our disposition of the first two assignments of error, we need not treat this assignment. The issue is moot.

For the above reasons, we affirm the judgment below.

It is ordered that appellee(s) recover of appellant their costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

/s/ AUGUST PRYATEL
*Judge*

STILLMAN, P.J. CORRIGAN, J., concur.

## JUDGMENT ENTRY OF THE COURT OF COMMON PLEAS

(Dated April 5, 1979)

No. 992397

IN THE COURT OF COMMON PLEAS
STATE OF OHIO, CUYAHOGA COUNTY

JAMES P. FRACKELTON,
*Plaintiff,*

VS.

GUS SWANSON, VIRGINIA SWANSON, AND SHIA SHAPIRO,
*Defendants.*

Defendants Gus and Virginia Swanson's Motion to Dismiss Granted. Complaint dismissed with prejudice at Plaintiff's costs.

/s/ LEO M. DEGRANDIS
*Judge*

## JUDGMENT ENTRY IN THE COURT OF COMMON PLEAS

(Dated March 26, 1979)

No. 992397

IN THE COURT OF COMMON PLEAS
STATE OF OHIO, CUYAHOGA COUNTY

JAMES P. FRACKELTON,
*Plaintiff,*

vs.

GUS SWANSON, VIRGINIA SWANSON, AND SHIA SHAPIRO,
*Defendants.*

Defendant Shapro's Motion to Dismiss Granted. Complaint dismissed with prejudice at Plaintiff's costs.

/s/ LEO M. DEGRANDIS
*Judge*